Supreme Court No. 80276-9
Court of Appeals No. 56736-5

SUPREME COURT OF THE STATE OF WASHINGTON

ESTATE OF PATRICK W. CAMPBELL, by and through its Personal Representative CHARLES CAMPBELL,

Appellant,

vs.

MICHAEL MILLER,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT MICHAEL MILLER

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I. ADDITIONAL STATEMENT OF FACTS

A. Previous Statements of Facts

In all of its appellate pleadings in this matter, Petitioner recites a litany of negative "facts", most of which are irrelevant to the issues in the appeal and appear calculated only to paint Respondent in a negative light.[1] Respondent directs this Court to the underlying facts set out in Respondent Michael Miller's original Appellate Brief and Reply Brief herein, as well as in the opinion of the Court of Appeals in Miller v. Campbell, 137 Wn.App. 762,155 P.3d 154 (2007), *review granted*, 162 Wn.2d 1005 (2008).

B. Additional Procedural History

On April 2, 2007, the Court of Appeals, Division I, issued the opinion in this matter which is currently before this Court for review. On April 4, 2007, the Office of the United States Trustee moved in the United States Bankruptcy Court for the Western District of Washington to reopen Michael Miller's 1998 bankruptcy case to administer his claim as an asset. Burdette dec., p. 1 and Ex. 1. The bankruptcy case, No. 98-09751, was

[1] Petitioner insists on maintaining, among other distorted versions of the record, that Respondent first argued in response to Petitioner's motion to dismiss pursuant to judicial estoppel that his claim is premised on injuries discovered after the bankruptcy case. Pursuant to RCW 4.16.340 the only basis for Michael Miller to bring suit in 2003 was that he had discovered within the preceding three years particular injuries caused by Campbell's sexual abuse. This was clearly argued in response to the Estate's prior summary judgment motion based on the statute of limitations. CP 679-683.

reopened on that date. Burdette dec., Ex. 2. Virginia Burdette was appointed Chapter 7 trustee on April 5, 2007. Burdette dec., Ex. 3. Upon application of Ms. Burdette, the bankruptcy court authorized her to retain Jo-Hanna Read as Special Counsel for the purpose of continuing to pursue Michael Miller's claims against the Estate of Campbell. Burdette dec., Ex. 4.

On May 1, 2008, this Court granted Respondent's motion for substitution of Virginia Burdette, the trustee of the bankruptcy estate of Michael Miller, as the real party in interest in this matter.

II. ISSUES PRESENTED FOR REVIEW

1. Does judicial estoppel apply to estop a bankruptcy trustee from pursuing a claim omitted by the debtor in a former bankruptcy proceeding?

2. Should a state court estop a debtor who omitted a potential claim from his schedule of assets in a bankruptcy from receiving any benefit from subsequent prosecution of the claim by the bankruptcy trustee on behalf of the bankruptcy estate?

3. Is judicial estoppel under the facts of this case inappropriate in light of the public policy embodied in RCW 4.16.340?

III. ARGUMENT

A. Judicial Estoppel should not be applied to bar a bankruptcy trustee standing as the real party in interest from pursuing a debtor's legal claim not listed as an asset during bankruptcy proceedings.

A trustee in bankruptcy succeeds to all causes of action held by the debtor at the time the bankruptcy petition is filed, including causes of action which are not listed in his bankruptcy schedules. In re An-Tze Cheng, 308 B.R. 448, 461 (B.A.P. 9th Cir., 2004); Marks v. Benson, 62 Wash.App. 178, 183, 813 P.2d 180, rev. denied, 118 Wash.2d 1001, 822 P.2d 287 (1991). Such causes of action are property of the bankruptcy estate, regardless of whether they are listed on schedules, and remain property of the estate until they are either administered or abandoned under the terms of the Bankruptcy Code. In re An-Tze Cheng, *supra*, at 460. See also: Bartley-Williams v. Kendall, 134 Wn. App. 95, 100, 138 P.3d 1103 (2006). A closed case can be reopened for the purpose of administering assets. 11 U.S.C. § 350(b). The trustee is authorized to prosecute, with or without court approval, any action or proceeding on behalf of the estate before any tribunal. In re An-Tze Cheng, *supra*, at 460. When a bankruptcy case is re-opened in order to administer a claim found to have been omitted from the original case, the bankruptcy trustee becomes the real party in interest as to the omitted claim. Bartley-

Williams, *supra*, 101. This is precisely what has occurred in the instant matter.

"[A] trial court may not generally apply the doctrine of judicial estoppel to bar a bankruptcy trustee standing as the real party from pursuing a debtor's legal claim not listed as an asset during bankruptcy proceedings." Arkison v Ethan Allan, 160 Wash.2d 535, 541, 160 P.3d 13 (2007). In fact, "[a]bsent some inconsistency on the part of the trustee, applying judicial estoppel to bar a bankruptcy trustee from becoming the real party in interest and pursuing the debtor's claims on behalf of the creditors is an abuse of discretion." Arkison, *id*, 541. See also: Sprague v. Sysco Corporation, 97 Wn. App. 169, 180, 982 P.2d 1202 (1999), *rev. denied*, 140 Wn.2d 1004 (2000). The reason for this is that "to prohibit the trustee from pursuing the claim on behalf of the estate may create a windfall for the party seeking to invoke judicial estoppel at the expense of the bankruptcy creditors." Bartley-Williams v. Kendall, *supra*, at 102, citing In re An-Tze Cheng, *supra*.

The claims premised on Charles Campbell's sexual abuse of Michael Miller during Michael's childhood are now being pursued by the trustee of Michael's bankruptcy estate, Virginia Burdette. Ms. Burdette should not be judicially estopped from pursuing these claims.

B. Any Determination as to Whether and/or to What Extent the Bankruptcy Debtor Should Receive any Benefit from the Previously Unlisted Asset Should Be Made by the Bankruptcy Court.

The claims of Michael Miller against the Estate of Campbell are now the property of the bankruptcy estate and are being pursued by the trustee. They constitute an asset of the estate, to be administered in accordance with federal bankruptcy law. Questions as to any exemption to which Michael Miller may be entitled or the disposition of any excess proceeds from the bankruptcy estate must be decided by the bankruptcy court under federal bankruptcy statutes and rules. "[T]he federal bankruptcy system is in a superior position to make determinations about the debtor's exemptions." Marks v. Benson, *supra*, at 184.

As this Court noted in Arkison, *supra*, fn. 2:

> The trial court and bankruptcy courts are in the best position to determine the extent of [the debtor's] recovery. Lopez, 283 B.R. at 29-30 (noting that the trial court may apply judicial estoppel against debtor as former litigator or impose sanctions, the bankruptcy court may disallow a claimed exemption if appropriate, and the debtor may face penalties and prosecution in certain circumstances). Thus, we remand this issue to the trial court for further determination.

Given the current posture of the case and the factors set out in further argument herein, any questions as to whether Michael Miller should be allowed to benefit personally from his claims against the Estate

of Campbell should be determined by the bankruptcy and trial courts after further determination of pertinent facts.

C. Judicial Estoppel Should Not Be Applied Against Michael Miller to Prevent Him From Receiving any Personal Benefits from the Pursuit of These Claims by the Bankruptcy Trustee.

1. Washington Has a Strong, Well-Established Policy of Providing Broad Avenues of Redress for Victims of Childhood Sexual Abuse.

The Washington legislature has articulated a strong public policy as to claims of victims of childhood sexual abuse, as evidenced by the 1991 Finding of Intent as to RCW 4.16.340, Actions Based on Childhood Sexual Abuse. As the Court of Appeals recognized, "[t]he Legislature's primary concern in enacting the special statute of limitations 'was to provide a broad avenue of redress for victims of childhood sexual abuse who too often were left without a remedy under previous statutes of limitation.' C.J.C. v. Corp of Catholic Bishop, 138 Wn.2d 699, 712, 985 P.2d 262 (1999)." Miller v. Campbell, *supra*, at 772-773.

The Court of Appeals correctly observed:

> The brief of amicus Washington State Trial Lawyers Association Foundation recognizes that federal bankruptcy law is controlling on when a duty to disclose arises, but contends that state law provides the touchstone for determining whether a party has asserted clearly inconsistent positions supporting judicial estoppel of a state tort action. We agree. "Additional considerations may

> inform the doctrine's application in specific factual contexts." New Hampshire v. Maine, 532 U.S. at 751, 121 S.Ct. 1808. In this case a substantial additional consideration bearing on the equities is the unique nature of childhood sexual abuse. The special statute of limitations, RCW 4.16.340, indicates that it is not inconsistent for a victim to be aware for many years that he has been abused, yet not have knowledge of the potential tort claim against his abuser. "Indeed, as our Legislature has found, childhood sexual abuse, by its very nature, may render the victim unable to understand or make the connection between the childhood abuse and the full extent of the resulting emotional harm until many years later." Cloud v. Summers, 98 Wash.App. 724, 735, 991 P.2d 1169 (1999). The victim in effect is under a "disability" and will not be charged with knowledge of the tort claim for serious injuries until that "disability" is lifted. Cloud, 98 Wash.App. at 735, 991 P.2d 1169.
>
> For that reason, the statute of limitations is closely intertwined with the equities of applying judicial estoppel to a claim of childhood sex abuse.

These principles were emphasized by Division II in Korst v.McMahon 136Wn. App. 202,208, 148 P.3d 1081 (2006):

> The legislature specifically anticipated that victims may know they are suffering emotional harm or damage, but not be able to understand the connection between those symptoms and the abuse.

The facts as to understanding the causal connection between the abuse and particular harms caused in Korst are similar in some regards to those in the present case. Ms. Korst always remembered childhood sexual abuse by her father and in fact revealed it to her mother when she was 14 years old. She wrote a letter to her father many years later (as an adult)

about the immense pain the sexual abuse had caused her. Some seven years after writing this letter, she began seeing a counselor and gradually came to understand the connections between the abuse and various symptoms and conditions she was suffering, including Post Traumatic Stress Disorder. The Court of Appeals found that the earlier anger and hurt and the statement that the abuse had "haunted" Ms. Korst throughout her life expressed in the letter did not constitute proof that she understood the nature of the damage that had been done. Korst. *supra*, at 209-210.

All of the appellate courts of this state have interpreted the present version of RCW 4.16.340 and legislative findings accompanying it as expressing a strong public policy in favor of allowing childhood sexual abuse victims to go forward years later with claims for damages stemming from the abuse and a clear understanding of the barriers caused by the effects of the abuse on the victim. The Court of Appeals below has accurately stated clearly established public policy in this regard.

2. Michael Miller's nonlisting of any potential claim against Patrick Campbell in his 1998 bankruptcy filings was not intentional and is not clearly inconsistent with his later assertion of his claims against Campbell's estate.

The Court of Appeals correctly construed and applied well-settled law pertaining to claims on behalf of survivors of childhood sexual abuse

and to application of judicial estoppel under the unique facts of this case. The Court of Appeals found that "federal bankruptcy law is controlling on when a duty to disclose arises but ... state law provides the touchstone for determining whether a party has asserted clearly inconsistent positions supporting judicial estoppel of a state tort action," Miller v. Campbell, *supra* at 772. The Court of Appeals correctly found "no tenable grounds for concluding that Miller's present lawsuit is clearly inconsistent with his position in bankruptcy", *Id,* at 774, and then carefully balanced and applied principles of two very important and well established legal principles: protection of the rights and interests of victims of childhood sexual abuse and protection of the integrity of the judicial process.

a. Judicial estoppel.

The core factors guiding a court's determination as to whether to apply judicial estoppel are "(1) whether 'a party's later position' is 'clearly inconsistent with its earlier position'; (2) whether 'judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled''; and (3) 'whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.'" Arkison v Ethan Allan, *supra*, at 538-539 (citing

New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)).

"[T]o give rise to an estoppel, the positions must be not merely different, but so inconsistent that one necessarily excludes the other." Markley v. Markley, 31 Wn.2d 605, 615, 198 P.2d 486 (1948). Judicial estoppel applies when "a claimant's particular representations are so inconsistent that they amount to an affront to the court." Johnson v. State of Oregon, 141 F.3d 1361, 1369 (9th Cir. 1998). The doctrine of judicial estoppel "is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories. Levinson v. U.S., 969 F.2d 260, 264 (7th Cir. 1992) (*citations omitted*). "The policies underlying the doctrine include preventing internal inconsistency, precluding litigants from playing fast and loose with the courts, and prohibiting parties from deliberately changing positions according to the exigencies of the moment." In re Coastal Plains, 179 F.3d 197, 206 (5th Cir. 1999) (citing United States v. McCaskey, 9 F.3d 368, 378 (5th Cir. 1993)). "Playing fast and loose with the courts" requires "more egregious conduct than just 'threshold' inconsistency." Britton v. Co-Op Banking Group, 4 F.3d 742, 744 (9th Cir. 1993) (citing Yanez v. Broco, 989 F.2d 323 (9th Cir. 1993)).

Judicial estoppel "is designed to prevent parties from making a mockery of justice by inconsistent pleadings" and "is applied to the calculated assertion of divergent sworn positions." American Nat. Bank of Jacksonville v. Federal Deposit Ins. Corp., 710 F.2d 1528, 1536 (C.A.11 (Fla.), 1983).

"Judicial estoppel is an equitable doctrine that preserves the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment." Teledyne Industries, Inc. v. N.L.R.B., 911 F.2d 1214, 1217-1218 (C.A.6, 1990). It is "generally applied where 'intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.'" In Re Coastal Plains, Inc., *supra*, at 206 (*citations omitted*).

"Judicial estoppel is strong medicine, and this has led courts and commentators to characterize the grounds for its invocation in terms redolent of intentional wrongdoing." Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1428 (7th Cir. 1993).

The three core factors listed above "are not an 'exhaustive formula' and '[a]dditional considerations' may guide a court's decision." Arkison, *supra*, at 538, (citing Markley, *supra*, at 614-15). "[J]udicial

estoppel is an equitable doctrine, invoked by a court at its own discretion, and driven by the specific facts of a case." Johnson v. State Of Oregon, *supra*, at 1368 (*citations omitted*).

If a party can reasonably explain the differing positions between nonlisting of a potential claim in bankruptcy and later pursuit of that claim, then judicial estoppel will not apply. Skinner v. Holgate, 141 Wash.App. 840, 848, 173 P.3d 300 (2007). "Judicial estoppel seeks to prevent the deliberate manipulation of the courts; it is inappropriate, therefore, when a party's prior position was based on inadvertence or mistake." Helfand v. Gerson, 105 F.3d 530, 536 (9th Cir. 1997) (citing John S. Clark Co. v. Faggert & Frieden, P.C., 65 F.3d 26, 29 (4th Cir. 1995)); In re Corey, 892 F.2d 829, 836 (9th Cir. 1989) (citing Konstantinidis v. Chen, 626 F.2d 933, 939 (D.C. Cir. 1980)), cert. denied, 498 U.S. 815 (1990). Judicial estoppel does not apply when incompatible positions are based on inadvertence or mistake rather than "chicanery." Johnson v. State Of Oregon, *supra*, at 1369. It should not be used to work an injustice. Matter of Cassidy, 892 F.2d 637, 642 (7th Cir. 1990). A court of equity "seeks to do justice and not injustice. It will not do 'inequity in the name of equity.' Nor will it do 'unjust or inequitable things.'" In re An-Tze Cheng, *supra*, at 459 (*citations omitted*). Judicial estoppel "should be reserved for compelling situations." *Id,* at 456. It is

"'strong medicine' because of its potentially harsh effects. Accordingly, the court will employ the doctrine of judicial estoppel with caution." In re Envirodyne Indus. v. Viskase Corp., 183 B.R. 812, 824 (Bankr. N.D. Ill. 1995) citing Chaveriat, *supra*..

b. Judicial estoppel is not appropriate under the facts of this case.

Michael Miller was sexually abused by his stepfather, Patrick Campbell, on many occasions over a span of six years ending in 1981. CP 333. He was terrorized by the experience, which left deep emotional scars. He felt guilty and ashamed. He never spoke of the abuse to anyone until 2002, when he spoke obliquely about it to his mother. His mother had been telling Michael about Campbell's health problems, and he became increasingly upset at the mention of Campbell's name. Finally, he told his mother that Campbell had "done more than just beat" him. CP 334. At this time, Michael began suffering from more of the nightmares that had plagued him for years, remembering more incidents of sexual abuse, and experiencing overwhelming feelings of worthlessness. CP 334. Michael contacted his half-brother Erik Campbell, the son of Patrick Campbell, and learned that Erik had also been sexually abused by Campbell. Patrick Campbell died on November 17, 2002. Erik and Michael discussed

possible claims against his estate for the damage caused by his abuse. Michael filed a claim against the estate on March 28, 2003. CP 334.

When his claim against the Campbell estate was filed, Michael was terrified. Overwhelmed by this and other events, Michael sought professional counseling for the first time in March, 2003, with Lisa Adriance, Ph.D. CP 334.

Dr. Adriance helped Michael understand the relationship between the feelings he recognized all along (fear, sleep problems, nightmares, etc.) and the sexual abuse. She provided him with information through therapy and recommended readings that helped him comprehend other symptoms that he was suffering but hadn't recognized, such as dissociation and flashbacks. Before entering therapy with Dr. Adriance, Michael had no idea he was suffering from Post Traumatic Stress Disorder and Major Depression as a result of the abuse. CP 335.

Given this background, it not surprising that Michael Miller did not tell his bankruptcy trustee in 1998 that he had been sexually abused by his stepfather during his childhood. Later, when Campbell's name resurfaced in 2002, Michael became increasingly agitated and overwhelmed with sequelae of the abuse in the form of nightmares, flashbacks, and extreme emotions. He began suffering from more of the nightmares that had plagued him for years, remembering more incidents of

sexual abuse, and experiencing overwhelming feelings of worthlessness. CP 334. He finally spoke about the abuse to his mother and subsequently contacted his half-brother Erik Campbell, the son of Patrick Campbell, and learned that Erik had also been sexually abused by Campbell. Patrick Campbell died on November 17, 2002. Erik and Michael discussed possible claims against his estate for the damage caused by his abuse. Michael filed a claim against the estate on March 28, 2003, at about the same time he began seeing Dr. Adriance. CP 334.

Contrary to the argument of Petitioner, allowing Michael Miller to go forward with claims against the Estate does not allow him to "derive an unfair advantage," nor does it "impose an unfair detriment" on the Estate. Ironically, the Estate had acquired a substantial advantage by the time this case was filed in 2003. Patrick Campbell died in 2002. The Estate could have invoked the protection of the Dead Man Statute, RCW 5.60.030, in which case Michael Miller would not have been allowed to testify to the incidents of abuse and would not have been able to present his claims. The case would have been dismissed for lack of admissible evidence. The Estate chose instead to present Michael Miller's deposition testimony to the court in support of an unsuccessful motion for summary judgment, thus waiving the protections of the Dead Man Statute. CP 470.

The equities in this case weigh heavily on the side of allowing Michael Miller's claims based on childhood sexual abuse to proceed.

D. Other Points Raised by Petitioner.

1. Claim splitting and res judicata.

Petitioner has argued that the Court of Appeals opinion impermissibly allows Michael Miller to "split" a claim in two. The Estate appears to be asserting that res judicata somehow prevents Mr. Miller from bringing this claim. As this Court observed in Norco Constr., Inc. v. King Cy., 106 Wn.2d 290, 293,721 P.2d 511 (1986):

> The purpose of res judicata is to ensure the finality of judgments. Res judicata. occurs when a prior judgment concurs in identity with a subsequent action in four respects:
>
> > There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made.

Rains v. State, 100 Wn.2d 660,663,674 P.2d 165 (1983).

There is no prior claim or action, and there is no prior judgment as to Michael Miller's claims for childhood sexual abuse. There is no identity of parties. There is no "claim splitting."

2. Discovery of Harm.

Petitioner repeatedly asks this Court to revisit the question of Michael Miller's discovery of particular harms and experience of new

memories of abuse. This issue was decided adversely to Petitioner below. The trial court denied Petitioner's summary judgment motion premised on the statute of limitations having elapsed. CP 469-471. This ruling is not before this Court for review.

IV. CONCLUSION.

The trial court in this matter failed to consider the public policy implications favoring preservation of claims on behalf of childhood sexual abuse, did not weigh appropriate equitable factors as to the issue of judicial estoppel, and failed to consider whether Michael Miller's "failure" to list a claim for childhood sexual abuse on his 1998 bankruptcy schedules was intentional or merely inadvertent. The Court of Appeals decision in this matter should be upheld.

DATED this 12 May 2008.

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